Supreme Court, U.S
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No. 01-1693

IN THE

Supreme Court of the United States

BETTY WILLINGHAM,

Petitioner,

v.

JAMES LOUGHNAN and BRIAN BEUCLER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
I. The questions presented for review were timely raised or decided in the district or circuit court below	6
II. The Eleventh Circuit's use of a "materially similar" standard in the instant case is in direct conflict with this Court's recent opinion in *Hope v. Pelzer*	6
III. The law-of-the-case doctrine is applicable to the case at bar	8
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Clark v. Beville, 730 F.2d 739 (11th Cir. 1984) 8

Fundiller v. City of Cooper City, 777 F.2d 1436 (11th Cir. 1985) 8

Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985) 8

Hope v. Pelzer, Supreme Court Case 01-309 ..... 6, 7, 8

Samples v. City of Atlanta, 846 F.2d 1328 (11th Cir. 1988) 8

Tennessee v. Garner, 471 U.S. 1 (1985) 8

Vasquez v. Metropolitan Dade County, 968 F.2d 1101 (11th Cir. 1992) 8

Petitioner, Betty Willingham, respectfully replies to Respondents' Brief in Opposition.

STATEMENT OF THE CASE

Respondents state

> [a]ccording to the officers, who testified at her criminal and civil trial, she had a long blade kitchen knife in her hand and was attempting to stab Pannuci in the back at the time she was shot. *An independent witness testified at both trials that she was on the step outside her house with an object in her hand at the time she was shot.*

(Emphasis added). Respondents' Brief, p. 1. This is a clear misstatement of the testimony and physical evidence presented at the civil trial. At the time that she was shot eight times by Respondents Beucler and Loughnan, Betty Willingham was standing in the threshold of her kitchen doorway with both her hands grasping her hair and screaming for them to "stop the dog." The dog in question was Panucci's police dog that was attacking the Petitioner's brother.

While initially charged with attempted first degree murder, the Petitioner, at the criminal trial, was convicted of attempted second degree murder, which required no specific intent and was consistent with her testimony that she had thrown one knife in the direction of Panucci's dog. It was not the Petitioner that sought to relitigate issues from the criminal trial, it was the Respondents. At the civil trial, the Respondents sought to present evidence of alleged cocaine use by the Petitioner to support their version of her alleged erratic behavior on the night of the incident. They proceeded with this alleged evidence despite the district court's warning that such evidence could properly be rebutted by the Petitioner. It was. As a result, the undisputed evidence at the civil trial was that the alleged cocaine was

sprinkled on the Petitioner's bloody gown by a member of the Boynton Beach Police Department after they had obtained it from the hospital, and that Betty Willingham was *not* under the influence of cocaine.

According to Respondents'

> [t]he Eleventh Circuit, in an unpublished opinion, affirmed the denial of the motion for summary judgment due to the claimed factual dispute of whether Plaintiff was doing nothing at the time she was shot or was attempting to murder an officer. In the panel's view, the issue preclusion argument was not properly presented for review.

(Respondents' Brief, p. 2). This is also incorrect. On August 27, 1997, during oral argument, Respondents' counsel, in response to the Court of Appeals panel's questioning the Respondents' failure to provide the criminal trial transcript to the district court or the appellate court, responded that said transcript would not assist the court in determining the basis of the criminal jury's conviction of the Petitioner. (*See* Judges' tape of oral argument in Case No. 96-4714). The Eleventh Circuit affirmed the ruling of the district court, holding that

> . . . [a]lthough appellants seek to rely upon the plaintiff's prior conviction of attempted second degree murder, we decline to address any issue of collateral estoppel or issue preclusion because the appellants did not present the criminal trial transcript to the district court in support of their motion for summary judgment, nor did they include said transcript in the record on appeal. In the absence of any issue preclusion, and in the summary judgment posture of this case, we must accept as true plaintiff's

> version of the relevant facts. According to plaintiff, she was shot when she was merely standing in the doorway of her house, screaming and pulling her hair and posing no threat to anyone. *If the officers fired on plaintiff even though she was posing no threat to anyone, they would have violated clearly-established law.*

(Emphasis added). *See* Appendix D, at 67a.

Respondents chose to not supplement the record on appeal with the criminal transcript or move for rehearing with the Eleventh Circuit. Additionally, the Respondents chose to not present the criminal trial transcript to the district court or renew their motion for summary judgment. On April 10, 1998, the jury returned a verdict in favor of the Petitioner and against Respondents Beucler and Loughnan and the City of Boynton Beach, Florida in the amount of $5,000,000 compensatory damages and individually against each Respondent in the amount of $500,000 punitive damages.

Nothing in the transcript of the criminal trial determines whether the Petitioner was convicted of attempted second degree murder of Pannucci based upon lunging or throwing a second knife as alleged by the Respondents. In fact, at no time prior to or during the trial did Respondents cite to the district court any portion of the criminal transcript where it was determined from the record that the Petitioner had been convicted for throwing a second knife. At both the criminal and civil proceedings, the Petitioner admitted to throwing two bottles and throwing one knife. At the criminal proceedings, the Petitioner was charged with attempted first degree murder of Panucci, which requires both intent and premeditation. By finding her guilty of attempted second degree murder, the criminal jury clearly based its verdict upon the admissions of the Petitioner that she had thrown two bottles and one knife.

Significantly, the district court in denying Respondents motion, stated:

> Having now had the opportunity to review the transcript of the criminal trial (to the extent available) in light of *Vasquez* and Florida law concerning collateral estoppel generally, the undersigned remains unable to conclude that Willingham's conviction necessarily resolved the question of whether the officers used unconstitutionally excessive force. Among other important distinctions, Willingham maintained in the criminal trial, just as she had in her civil trial, that she threw only one knife, and was unarmed at the time of the shooting. *Thus, although the jury found her guilty of attempted second degree murder of Panucci, the jury may have resolved the conflict in the evidence concerning whether one or two knives were thrown to be consistent with Willingham's version of the offense.* If that occurred, the jury would never have reached the issue of whether Willingham was acting in self defense and whether the officers were justified in the use of deadly force after the first knife was thrown. Thus, similar to *Vasquez, it cannot be ascertained whether Willingham's criminal trial jury ever addressed the propriety of Loughnan and Beucler's actions.*

(Emphasis added). *See* Appendix B, at 33-34a.

The district court went on to state:

> Given the conflicts in the evidence concerning the sequence of the pertinent events and the general nature of the verdict, Defendants cannot demonstrate

> that a determination that the officers were justified in shooting Willingham was a critical and necessary part of the jury's decision that Willingham attempted to kill Panucci. *Therefore, collateral estoppel and issue preclusion, did not preclude Willingham from proceeding to trial in this case.*

(Emphasis added). *See id.* at 35a.

Not only was the case law clear at that time that the conduct of the Respondents was unlawful, the testimony of the Respondents clearly shows that they knew their conduct was unlawful. They knew in 1987 that it was unlawful to shoot an unarmed person who posed a threat to no one. It was for this reason that they concocted the lies about what Petitioner was doing at the time that they shot her. Why else would they state that she was lunging off of the stoop at Officer Panucci with a knife in her hand, when in fact she was merely standing at her door pulling her hair? Why else would they plant the second knife under her body, except to justify what they knew to be an unlawful shooting? Their own testimony proves conclusively that they were aware of the law and knew that their actions were not protected under qualified immunity.

In the civil case, Stanley Williams, the eyewitness, testified that he went to the Boynton Beach Police Department on the night of the incident to complain because Respondents had shot the Petitioner for no reason. Additionally, both Petitioner's police expert *and Respondents' police expert* opined that if, at the time of the shooting, Petitioner was unarmed, then the deadly force utilized by the Respondents was inappropriate and below acceptable police standards.

I. The questions presented for review were timely raised or decided in the district or circuit court below:

The Petitioner was the Appellee in the proceedings below. In her response brief, Petitioner quoted the unpublished opinion of the Eleventh Circuit panel where they stated that "*[i]f the officers fired on plaintiff even though she was posing no threat to anyone, they would have violated clearly-established law.*" (Emphasis added). *See* Appendix. D, at 67a; Appellee's Response Brief, p. 3. In returning a verdict for the Petitioner, the civil jury determined from the evidence that the Petitioner was unarmed and posed a threat to no one at the time that she was shot by Respondents. The district court concurred with the jury verdict and the opinion of the first panel that such conduct violated clearly established law. The district court in its decision stated that with respect to grounds three (insufficiency of the evidence) and four (qualified immunity) of Respondents' Motion for Judgment as a Matter of Law, "[t]he third and fourth arguments have already been resolved by this Court, which rulings the Court adopts herein." *See* Appendix B, at 29-30a. As the appellants in the proceedings below, it was the Respondents' burden to demonstrate an exception to the law of the case. They did not do so.

II. The Eleventh Circuit's use of a "materially similar" standard in the instant case is in direct conflict with this Court's recent opinion in *Hope v. Pelzer*

In the instant case, the Court of Appeals held that

> [a]lmost always, to establish the law clearly in the context of the Fourth Amendment, *a materially similar case must have already decided that what the police officer was doing was unlawful*. . . . ('[N]o bright line exists for identifying when force

> is excessive; we have therefore concluded that unless a controlling and materially similar case declares the official's conduct unconstitutional, a defendant is usually entitled to qualified immunity.'). . . . Our own survey of the case law indicates that in 1987 it was not clearly established that it constituted excessive force to shoot a person under the circumstances presented in this case.

Willingham v. Loughnan, 261 F.3d 1178, 1187 (11th Cir. 2001).

According to Respondents, "[o]nly where there is a pre-existing, 'factually defined' case which is precisely on point can a litigant survive the defense of qualified immunity before the Court of Appeals for the Eleventh Circuit." (Respondents' Brief, p. 5). While, this is a correct statement of the Eleventh Circuit's position with respect to qualified immunity, it is wrong in light of this Court's opinion in *Hope v. Pelzer*, 2002WL1378412 (U.S. 2002) (argued April 17, 2002).

> This rigid gloss on the qualified immunity standard, though supported by Circuit precedent, is not consistent with our cases. . . . Our opinion in *Lanier* thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier*, we expressly rejected a requirement that previous cases be fundamentally similar. Although earlier cases involving fundamentally similar facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with materially similar facts. Accordingly, pursuant to *Lanier*, the salient question that the Court of Appeals ought to have asked is whether the state of the law

> in [1987] gave respondents fair warning that their alleged treatment of [Willingham] was unconstitutional.

Hope at p. 6. The Eleventh Circuit, in stating that the case law was not clearly established as to what constituted excessive force in 1987, ignored the fair warning provided in its prior opinion in the instant case, this Court's rulings, and several cases from the Eleventh Circuit which clearly dictate that excessive force used in similar circumstances has been determined to be not entitled to qualified immunity. Appendix D, at 67a; *Tennessee v. Garner*, 471 U.S. 1 (1985); *Clark v. Beville*, 730 F.2d 739 (11th Cir. 1984); *Fundiller v. City of Cooper City*, 777 F.2d 1436 (11th Cir. 1985); *Gilmere v. City of Atlanta, GA.*, 774 F.2d 1495 (11th Cir. 1985); *Samples v. City of Atlanta*, 846 F.2d 1328 (11th Cir. 1988); *Vazquez v. Metropolitan Dade County*, 968 F.2d 1101 (11th Cir. 1992). Additionally, the Respondents own conduct supports a finding that they knew that their conduct of shooting an unarmed woman when she was a threat to no one was unconstitutional. The planting of a second knife by the Respondents and the fabricated cocaine evidence was solely for the purpose of covering up conduct which they knew to be unlawful.

III. The law-of-the-case doctrine is applicable to the case at bar

According to Respondents, the first Circuit panel opinion

> . . . was nothing more than an opinion that IF those facts which Plaintiff claims are in dispute are the ultimate facts and that the criminal trial transcript and conviction are not considered, then there would be no entitlement to qualified immunity. . . . Petitioner does not argue that the facts were the same at the motion for summary judgment stage as at trial.

(Respondents' Brief, p. 13). At the summary judgment stage, Petitioner provided evidence that at the time of the shooting, she was unarmed and a threat to no one. At the trial, the Petitioner proved that she was unarmed and a threat to no one. In fact, the "ultimate facts" or actual facts were more chilling than what Petitioner initially presented in her response to summary judgment. At trial, the Petitioner proved that she was gunned down by the Respondents while she was unarmed and posed no threat, that they then attempted to cover up their unlawful conduct by planting a second knife and fabricating cocaine evidence by sprinkling pure cocaine on her bloody gown while it was laying on a table in the evidence room of the City of Boynton Beach Police Department. These were the actual and ultimate facts proven at the trial.

Respondents incorrectly state that "[w]hen considering the motion for summary judgement, the district court did not address clearly established law in its denial of summary judgment, nor did the Court of Appeals." (Respondents' Brief, p. 16). As the first Court of Appeals panel stated: "*If the officers fired on plaintiff even though she was posing no threat to anyone, they would have violated clearly-established law.*" (Emphasis added). Appendix. D, at 67a. The issue for the district court and the first panel of the Court of Appeals was whether the use of deadly force, under the circumstances in the instant case, was objectively reasonable under clearly established law, not whether a prior "materially similar" case, under the incorrect standards of the Eleventh Circuit had provided notice to the Respondents that such conduct was unlawful. As stated by Respondents, "[i]f the facts presented by plaintiff at the summary judgment stage become, without notable exception, the 'actual facts' as developed at trial, then the qualified immunity determination, if made at the prior appellate panel, should not be revisited." (Respondents' Brief, p. 17-18). The civil jury was properly

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instructed that, in light of the Petitioner's convictions, they "must accept these convictions as established facts in your deliberations and may not reject them or otherwise question their validity." *Willingham*, *supra* at 1185 n.10. The jury also properly found that Respondents used excessive force, as the evidence showed that, at the time of the shooting, Petitioner was a threat to no one. The evidence presented at trial support the findings by the jury that the Respondents violated the Petitioner's constitutional rights by using excessive force. The evidence also supported a finding that the constitutional right was "clearly established" at the time and precluded the defense of qualified immunity.

CONCLUSION

For the foregoing reasons and as stated in her Petition, Petitioner respectfully requests that the Court grant certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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